SUPREME COURT, U. S.

Supreme Court, U. S.
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MICHAEL RODAK, JR.

In the

Supreme Court of the United States

October Term, 1973

No. 73-908

VINCENZO CONSIGLIO
GARY ZIMMERMAN
JOHN LAUDANO
FRED CAMPAGNUOLO
JAMES DeNEGRIS
Petitioners

vs.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND DISTRICT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND DISTRICT

The Petitioners, Vincenzo Consiglio, Gary Zimmerman, John Laudano, Fred Campagnuolo and James DeNegris, pursuant to Rule 23, respecfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on October 12, 1973.

I. CITATION.

The petitioners seek herein to have reviewed the judgment of the United States Court of Appeals for the Second Circuit, styled there *United States v. Consiglio, et at,* ..... F. 2d ..... (2nd Cir. 1973), D. N. 73-1463, which affirms the petitioners' judgment of conviction in the United States District Court, District of Connecticut. The said District Court proceedings have been likewise styled *United States v. Consiglio, et al* and are reported at 342 F. Supp. 556 (D. Conn. 1972) D. N. H-24; and .....F. Supp. ..... (D. Conn. 1-24-73), D. N. H-24.

An application for an extension of time to file a Petition for a Writ of Certiorari was filed by petitioners and was denied by Justice Thurgood Marshall pursuant to Rule 34 upon the ground that the application was not made within ten days of the expiration of the time.

II. JURISDICTIONAL GROUNDS.

On October 12, 1973, the United States Court of Appeals for the Second Circuit entered its order affirming the Petitioners' judgment of conviction for a violation of 18 United States Code 1084 entered in the United States District Court for the District

of Connecticut on May 7, 1973. The United States Court of Appeals for the Second Circuit stayed its mandate pursuant to Rule 41 (b) of the Federal Rules of Appellate Procedures.

The jurisdiction of this Court is invoked under the authority of 28 U.S.C.A. section 1254 (1).

III. QUESTIONS SOUGHT TO BE REVIEWED.

1. Does the record of this case reveal the government's compliance with 18 U.S.C.A. sections 2516 and 2518 in applying for and executing wiretapping in the Districts of Florida and Connecticut?

2. Is Title III of the Omnibus Crime Control and Safe Streets Act of 1968 constitutional on its face and as applied herein?

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS.

The petitioner relies upon the following provisions of the United States Constitution:

a. With respect to questions sought to be reviewed, Nos. 1 and 2:

> Amendment IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

> Amendment V: No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .
>
> Amendment IX: The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The petitioners rely upon the following provisions of the statutes of the United States:

a. With respect to questions sought to be reviewed, Nos. 1 and 2:

> 18 U.S.C.A. section 2516(1): The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of — . . .

b. Title III of the Omnibus Crime Control and Safe Streets Act. of 1968, 18 U.S.C.A. sections 2510-2520.

V. STATEMENT OF THE CASE.

This petition involves two wire interception procedures, one in Florida, the other in Connecticut, conducted by agents of the Federal Bureau of Investigation. On February 18, 1970, Gary L. Betz, Special Attorney attached to the Criminal Division of the Department of Justice, submitted an application for

wire interception authority to Judge Joe Eaton in the Southern District of Florida. Similarly, on April 7, 1970 in Connecticut, David Margolis, also a Special Attorney, submitted an application for wiretapping authority to Judge T. Emmet Clairie in the District of Connecticut. Pursuant to each application, the respective courts issued orders permitting FBI agents to conduct wire interceptions for a period of ten days in Florida and fifteen days in Connecticut pursuant to the Omnibus Crime Control and Safe Streets Act of 1968, 18 United States Code Annotated section 2510, et seq.

In both cases the sworn Applications submitted by government Special Attorneys included a paragraph #2 which substantially reads as follows:

> 2. Pursuant to the powers conferred on him by Section 2516 of Title 18, United States Code, the Attorney General of the United States, the Honorable John N. Mitchell, *has specially designated* the Assistant Attorney General for the Criminal Division of the Department of Justice, the Honorable Will Wilson, to authorize affiant to make this application for an order authorizing the interception of wire communications. The letter of authorization signed by the Assistant Attorney General is attached to this application as Exhibit A.[1]
>
> (Emphasis supplied)

In both cases, the "Exhibit A" referred to in the governments' applying papers was a letter which facially purports to have been signed by Will Wilson, then Assistant Attorney General, and indicates that he had reviewed and made personal

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[1] The language quoted is from the Connecticut application. Paragraph 2 of the Florida application is worded slightly differently.

determinations concerning the legal validity of the applications. In the Florida interception procedure, Mr. Wilson's letter states:

> Dear Mr. Betz:
>
> This is with regard to your request for authorization to make application pursuant to the provisions of Section 2518 of Title 18, United States Code, for an order of the court authorizing the Federal Bureau of Investigation to intercept wire communications for a ten (10) day period to and from two telephones, one subscribed to by Patrick DiPietro and the other subscribed to by Frank Perriccello, c/o Fred Campo, both located in the premises rented by Fred Campagnuolo, a/k/a Fred Campo at Apartment D-3, 4500 North Dixie Highway, West Palm Beach, Florida, and bearing numbers 844-7900 and 842-7382, respectively, in connection with the investigation into possible violation of U.S.C. 1084, 1952, and 371, by Joseph Patrick DiPietro, a/k/a Patrick DiPietro, and Fred Campagnuolo, a/k/a Fred Campo, and others as yet unknown.
>
> *I have reviewed your request and the facts and circumstances detailed therein and have determined that probable cause exists to believe* that Joseph Patrick DiPietro, a/k/a Patrick DiPietro, and Fred Campagnuolo, a/k/a Fred Campo, and others as yet unknown have committed and are committing offenses enumerated in Section 2516 of Title 18, United States Code, to wit: violations of Sections 1084, 1952, and 371 of Title 18, United States Code. *I have further determined that there exists probable cause to believe that the above-named persons will make use* of the above-described two telephones in connection with those offenses, that wire communications concerning the offenses will be intercepted, and that normal investigative procedures are unlikely to succeed or are too dangerous to be used.

Accordingly, you are hereby authorized, under the power *specially delegated to me in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, pursuant to the powers conferred on him by Section* 2516 *of Title* 18, United States Code, to make application to a judge of competent jurisdiction for an order pursuant to Section 2518 of Title 18, United States Code, authorizing the Federal Bureau of Investigation to intercept wire communications from the above-described two telephones for a period of ten (10) days.*

Sincerely,

Will Wilson /s/
WILL WILSON
Assistant Attorney General

In both cases, the United States District Judges granted the orders sought. In facial conformity with Section 2518(4)(d), the District Courts' interception orders stated certain findings, one of which was that the Application presented to the Court had been:

> authorized by the Assistant Attorney General for the Criminal Division of the Department of Justice, the Honorable Will Wilson, who has been specially designated by the Attorney General of the United States, the Honorable John N. Mitchell, to exercise the powers conferred on him by Section 2516 of Title 18, United States Code.*

There is no transcript of the proceedings in chambers during which Attorney Gary L. Betz presented the Florida Appli-

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* Emphasis added.

* Interception orders of Eaton, J., Southern District of Florida dated February 18, 1970 and Claire, J., District of Connecticut dated April 7, 1970.

cation to Judge Joe Eaton. However, there is a transcript of the Connecticut hearing. That transcript reveals that the applying attorney, David Margolis, also submitted another document to the Court. That document was a U.S. Government Memorandum addressed to Will Wilson, Assistant Attorney General, purportedly from the Attorney General, John N. Mitchell. The transcript of the April 7, 1970 ex parte hearing indicates that the Court read this memorandum into the record, and then inquired as follows:

> THE COURT:
>
> * * *
>
> Now is there, pursuant to this delegation of authority from the Attorney General to Will Wilson, a further direct communication to you or does this represent that delegation of authority?
>
> MR. MARGOLIS: No, your Honor, I have a letter written to me by Will Wilson, the Assistant Attorney General of the United States Department of Justice, which I offer as the Government's next —
> *Transcript,* April 7, 1970, p. 5

At this point, Attorney Margolis submitted to the Court Exhibit A to the Application, the document described as "the letter of authorization signed by the Assistant Attorney General." — The inventory notice of the Florida wire interception procedures required by 18 U.S.C.A. section 2518(8)(d) was served upon the various dates, all beyond the time provided in 18 United States Code, Section 2518(8)(d).

The Indictment in this case charged violations of 18 United States Code Sections 1084 and 1952 in addition to a conspiracy to violate the aforesaid sections. After it was returned, the government continued to maintain the impression,

in the minds of defense counsel and in the mind of the District Court, that, having been specially designated by the Attorney General, Assistant Attorney General Will Wilson had personally authorized both the Florida and Connecticut applications. For example, in partially granting the Motions for Discovery and Inspection filed by all the defendants, the District Court ordered the government to state "the identity of the investigative or law enforcement officer or officers making (each) application and the officer authorizing (each) application." Motion for Discovery and Inspection, par. 6(c). In its Compliance with All Defendants' Motions For Discovery, the government responded: "See Applications and Orders on file with the Clerk of this Court." This response, of course, referred the defendants to the items previously here quoted, which suggest unequivocally that the Attorney General has specially designated Will Wilson, Assistant Attorney General, who had personally authorized both Applications.

Toward the end of 1971, the government's trial attorney, James Kelley, first orally disclosed the non-role of Will Wilson and subsequently the government filed the affidavits dated December 14, 1971 of Henry E. Petersen and Sol Lindenbaum. The Petersen affidavit indicates that he, while a *Deputy* Assistant Attorney General in the Criminal Division, signed Will Wilson's name to the hereinbefore specified Wilson letters of February 13 and Aprl 6, 1970 to Messrs. Betz and Margolis and that this was done "in accordance with the authorization of Will Wilson and the standard procedures of the Criminal Division."* The affidavit of Sol Lindenbaum, Executive Assistant to the Attorney General of the United States, indicated that

*No copy of the procedures referred to was ever filed.

memos under date of February 13 and April 6, 1970 from the Attorney General to Will Wilson were each personally initialled by Attorney General Mitchell.

In response to the affidavits of the Justice Department officials, the petitioners here filed Supplemental Motion for Discovery and Inspection dated January 3, 1972. On January 5, 1972, they also filed a motion under Rule 17(b) of the Federal Rules of Criminal Procedure requesting the court to issue subpoenas for John N. Mitchell, Henry E. Petersen and Will Wilson. These two motions were subsequently denied by the court.

On January 5, 1972, the government confessed error. It admitted that Will Wilson had not authorized either application, and it further confessed that he had not signed either of the documents which had been submitted to the issuing judges, under oath, as "the letter(s) of authorization signed by the Assistant Attorney General."

> THE COURT: You will stipulate to that?
> MR. KELLEY: Yes, subject to — well, subject to a — well, it is not subject to a proviso. Mr. Wilson did not read the file in these two wiretaps; he did not read the affidavits; he did not read any of the papers; he took no personal action in this particular, in these particular wiretaps. *Transcript*, January 5, 1972, pg. 35.

On April 20, 1973 the District Court denied the petitioners' Motion to Suppress and Dismiss and during July of 1972, after extensive evidentiary hearings were held in the District Court on issues involving statutory and constitutional compliance by the government, that court again on January 26, 1973 filed another Memorandum denying the petitioners' Motions to Suppres and Dismiss. Thereafter, the petitioners with the concur-

rence of the District Court reserved particular issues for appellate review and on May 7, 1973 entered a plea of nolo contendere to the Fifth Count of the Indictment charging a violation of 18 United States Code Section 1084. This judgment of conviction was affirmed by the United States Court of Appeals for the Second Circuit on October 12, 1973.

VI. ARGUMENT OF LAW.

Question 1

The Congressional hearings[4] and Senate Report[5] on Title III of the Omnibus Crime Control and Safe Streets Act of 1968 make it abundantly clear that the two purposes of this legislation; namely, to protect privacy and to promulgate legislatively those circumstances and conditions under which electronic eavesdropping might be executed, are inextricably interrelated. In the minds of the most ardent champions of wiretapping legislation, there was an abiding concern that it be executed under the tightest of procedural controls, not all of which were left by the Congress in this legislation to the Federal Judiciary.[6]

It is submitted that by enacting Section 2516 the Congress intended that the first person charged with protecting the citizenry from unwarranted invasions of their privacy by means

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[4] *Hearings*, Subcommittee on Criminal Laws and Procedures of the Committee of the Judiciary, United States Senate, 90th Congress, 1st Session (1967), entitled *Controlling Crime Through More Effective Law Enforcement.* (Hereinafter called *Hearings*).

[5] Senate Report, No. 1097, 90th Congress, 2d Session (1968). Hereinafter called (*Report*).

[6] See: Testimony of the Honorable Sam J. Ervin, Jr. of North Carolina, *Hearings* pp. 5-6.

of electronic eavesdropping would be the nation's chief law enforcement officer himself unless he chose to "specially designate" an Assistant Attorney General to perform this statutory duty. The petitioners submit that a minimal compliance with statutory duties imposed by this section would include the Attorney General's carefully screening any applications to be made to a federal court prior to his indicating authorization. Such a discharge of duty would assure that whatever policy concerning electronic eavesdropping was to be adopted would reflect "sound legal advice" and have the "healthy effect" of guaranteeing that the decision to seek a court order for such exceptional intrusion into the privacy of the citizenry was "wisely taken." *Standards Relating to Electronic Eavesdropping,* American Bar Assocation Project on Minimum Standards for Criminal Justice, Approved Draft, 1971, "Prosecutor authorization," p. 132. In this manner, the authorizing official himself would be carrying out the twofold congressional intent of Chapter 119: Protecting the privacy of wire and oral communications and developing centralized uniformity in the use of court-approved wire interception devices by governmental agents.[7]

In the record of this case, there is no evidence that John N. Mitchell, while Attorney General and allegedly the authorizing official for the wire interception procedures in this case, ever made the careful and personal review of the applying papers or investigatory files related to this prosecution to determine whether the Florida and Connecticut applications should have been submitted to the District Courts. The petitioners below

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[7] See: Testimony of the Honorable Frank Hogan, *Hearings,* p. 1095; the Honorable J. Edward Lumbard of the Court of Appeals for the Second Circuit, p. 172 on the need for a thoughtful review and a careful screening of wiretap requests by the authorizing official. The courts below here required a much less demanding statutory standard.

moved unsuccessfully to strike all of the affidavits filed by the government during the suppression hearings; yet, the Lindenbaum affidavit still fails to indicate under what circumstances the Attorney General placed his initials on the memo to Will Wilson and it further fails to indicate whether the Attorney General gave any more *personal* attention to these wire interception matters than, as the petitioners contended below, wanting Mr. Wilson, the Assistant Attorney General, to review personally the matters and determine whether, as the Wilson letter itself indicates, there was "probable cause" to believe that the instant crimes were being committed and the telephones in question were being used in the alleged criminal activities.*

The government in submitted its applying papers under oath and obtaining court orders for wire interception procedures based on those papers has made its case and the subsequently filed affidavits of Messrs. Petersen and Lindenbaum should not in this context be considered by any judicial tribunal to assist

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*The serious imperfections of this record are intensified by three circumstances. First, the total denial of discovery by interrogatory and/or subpoena in the District Court to the petitioner in his attempts to obtain facts pertinent to the authorization issue. *Appendix*, pp. 28a-33a. Second, the July 10, 1973 testimony of John N. Mitchell before the Senate Select Committee wherein he stated he could not recall authorizing the now well-publicized 17 so-called national security wiretaps. *Appendix*, pp. 57a-60a. Third, the Report from the Committee on Foreign Relations concerning the nomination of Henry A. Kissinger to be Secretary of State wherein these 17 taps are discussed and in part it is reported:

> The Committee was deeply concerned, however, over the pattern of casual and arbitrary infringement of individual rights which this inquiry brought to light . . . Examination of the FBI report on these wiretaps revealed that very little, if any, justification was presented in most instances and that the Attorney General's review was routine. At the time of the Surveillance in question adequate procedural safeguards with respect to authorizing and terminating the taps were not observed. *Senate Executive Report*, No. 93-15, 93d Congress, 1st Session (1973) pp. 4-5.

the government in rehabilitating its case. *United States v. Sklaroff*, 360 F. Supp. 353, 361 (N. D. Ga. 1973); *United States v. Boone*, 348 F. Supp. 168, 170 (E. D. Va. 1972).

Section 2518(1)(a) and (4)(d) require that the government's applying papers and any subsequent court order indicate the official authorizing the wire interception procedure within the meaning of Section 2516. The petitioners submit that a fair reading of the applying papers and court orders in both the Florida and Connecticut interception proceedings in this case lead to the inescapable conclusion that the Assistant Attorney General, Will Wilson, was the authorizing and so-named official.* Consequently, the government as a matter of judicial policy ought to be estopped. *Holt v. Southern Raliway*, 51 F.R.D. 296, 298-299 (D. C. Tenn. 1969).

The filed affidavits reveal that the sole evidentiary basis for the claim that the wire interception procedures in this case were authorized by Attorney General Mitchell is the affidavit dated December 14, 1971 by Sol Lindenbaum. The government below introduced this affidavit over the petitioners' objection in the course of suppression hearings under Rule 41 of the Federal Rules of Criminal Procedure. The affidavit ought not to have been admitted as independent evidence to establish facts material to the issues being tried. *McIver v. Kyger*, 3 Wheat (U.S.) 53, 57 (1818). Particularly, in view of the fact that the petitioners vigorously objected to its use and strenuously sought "live" and available testimony of prominent justice department officials.

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* *United States v. Sklaroff*, 360 F. Supp. 353, 356-357 (N. D. Ga. 1973) reveals that government trial attorneys agreed with the petitioner's reading of applying papers in a similar fact pattern.

In addition to the hearsay objection to the admissibility of these affidavits, the petitioners argue that there are three evidentiary grounds for their exclusion.

First, both the Lindenbaum and two Petersen affidavits are objectionable in that the affiants purport therein to establish their authority to act as the agents of others solely by their own assertions. "The authority of an agent may never be proved by his own ex parte declaration," *United States v. Konovsky,* 202 F. 2d 721, 728 (7 Cir. 1953); *Perper v. Sonnabend,* 221 F. 2d 142, 144 (5 Cir. 1955); *Brownell v. Tide Water Assoc. Oil Co.,* 121 F. 2d 239, 244 (1 Cir. 1941).

Second, the Lindenbaum affidavit and the second Petersen affidavit are objectionable because they purport to state as facts what are really conclusions of law — that the Attorney General "approved" the requests for authority and that the applying attorneys were thereby "authorized." Obviously, a witness's assertion of a conclusion of law is simply opinion evidence and inadmissible on that ground, *American Indem. Co. v. Richland Oil Co.,* 273 F. Supp. 702, 707 (D. S. C. 1967); as well as on the ground that it attempts to invade the province of the trier.

Third, both the Lindenbaum affidavit and the Petersen affidavits are objectionable in that they purport to state facts personally known to the affiant without including a proper foundation. Wigmore, *Evidence,* §654 (2d ed. 1940. Most glaring is the Lindenbaum assertion that the two U.S. Government memoranda attached to his affidavit were "personally initialled" by the Attorney General. There is nothing in the affidavit indicating that Mr. Lindenbaum himself observed the Attorney General performing the act of affixing his initials; nor does the affidavit contain any evidence indicating that Mr.

Lindenbaum can recognize the Attorney General's initials when he sees them. See Wigmore, *supra* §657(a). Similarly, both the Petersen and the Lindenbaum affidavits lack any statement of personal observations or facts personally known on which they base their conclusory assertions that the Attorney General "approved" the requests for authorization.

The April 7, 1970 transcript of Connecticut chamber's proceedings indicates that Attorney Margolis did present to the issuing judge a U.S. government memorandum allegedly initialled by the Attorney General which referred to the Margolis application. The government argues below that, by construing this document, the issuing judge could have found that the Attorney General himself had authorized the Margolis application. The petitioners dispute that contention; however, the point here is that, even if this court considers the incompetent affidavit submitted by the government, there is nothing in the record indicating that the U.S. government memorandum relating to the Florida application was ever shown to District Court Judge Eaton. Indeed, there is nothing in the record on which the government has chosen to rely indicating that even Attorney Betz ever saw that memorandum. Consequently, in view of the government's subsequent judicial admissions that the Wilson letter is false and that the sworn representations of Wilson' role as the statutory authorizing officer were error, there was nothing presented to Judge Eaton on the basis of which he could find that the application was authorized by a proper officer. In effect, there was nothing before Judge Eaton upon which he could find that the Attorney General properly authorized the applications for the Florida wire interception proceedings. *Baysden v. United States,* 271 F. 2d 325 (4 Cir. 1959); *Lopez v. United States,* 370 F. 2d 8, 10 (5 Cir. 1966).

Following upon evidentiary hearings conducted March 19, 1973 during which prominent Justice Department officials testified in the Southern District of Florida that court suppressed evidence gleaned from wire interceptions in cases with fact patterns identical to this one. *United States v. Sklaroff*, 362 F. Supp. 478 (S. D. Fla. 1973); *United States v. Winter*, 362 F. Supp. 484 (S. D. Fla. 1973). The *Sklaroff* opinion observes that according to the received testimony of Mr. Henry Petersen the so-called Wilson letter was drafted to comply with Section 1.5 of the Justice Department's Manual for Conduct of Electronic Surveillance Under Title III of Public Law 90-351, which paraphrases in effect the legal procedure for authorization set out in 18 United States Code Section 2516.

Assuming in this case[10] *arguendo* the same purpose for the Wilson letters, the petitioners would submit, as Judge Mehrtens found in *Sklaroff, supra,* that the government's applying papers are "untrue" and that deception has occurred. *United States v. Sklaroff, supra,* p. 481. See also: *United States v. Sklaroff*, 360 F. Supp. 353 (N. D. Ga. 1973); *United States v. Stanley*, ... F. Supp. ..... crim. no. 27541 (N. D. Ga. June 13, 1973); *United States v. King*, 478 F. 2d 494 (9th Cir. 1973); *United States v. Chavez*, 478 F. 2d 512 (9 Cir. 1973), petition for cert. granted 5/21/73, 13 Cr. L. 4049.

> It is incredible that attorneys, officers of the Court, officials of the Federal government, could have prepared an interrelated series of documents expressly drafted for presentation to federal judges in support of requests for wiretap orders that contained recitations of statutory designation and authorization that

[10] The Florida wire interception proceedings in this matter originated and were executed in the Southern District of Florida.

we are now told were never in fact *operative.* (emphasis added) *United States v. Sklaroff*, 362 F. Supp. 478, 483 (S. D. Fla. 1973).

Furthermore, a review of Agent Ludwig's affidavit attached to the Connecticut application indicates that the entire Connecticut proceedings have been tainted by the Florida circumstances. *Alderman v. United States*, 394 U.S. 165 (1969); *Weeks v. United States*, 232 U.S. 338 (1914). Consequently, having been obtained pursuant to a court order which was itself obtained on the basis of the illegally seized Florida evidence, all evidence obtained pursuant to the Connecticut order must also be suppressed.

In the District Court during pre-trial proceedings there was an extended inquiry into the area of the use of alternative investigative procedures mandated by 18 U.S.C.A. section 2518 (1)(c) and (3)(c). The petitioners submit that a fair reading of the record in this regard reveals that neither the applying papers nor court orders for wire interceptions in this case nor the testimony of government agents themselves in the trial court reveal anything but the government's rush to commence wire interceptions in violation of the Congressional intent. Finally, the petitioners submit that 18 U.S.C.A. section 2518(8)(d) was not complied with by the government. It requires that notice of interceptions be served upon the subject within the ninety days of termination of the interceptions or the terminations of any extension granted by the court. No such extensions were granted in the Florida proceeding and none of the petitioners was served within the ninety day period. *United States v. Eastman*, 326 F. Supp. 1038, aff'd. 465 F. 2d 1057 (3 Cir. 1972).

Question 2

The petitioners challenge the constitutionality of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 on the ground that it authorizes an intrusion into the citizen's privacy which is excessive, indiscrminate and violative of the Fourth Amendment. This is illustrated by Section 2518(5) which allows a continuous intrusion with virtually unlimited 30 day extensions not circumscribed by Sections 2518(1)(d) and (4)(e). *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967); and *Osborn v. United States*, 385 U.S. 323 (1966).

This record reflects that FBI agents were investigating violations of 18 U.S.C.A. sections 1084 and 1952 each of which involves a peculiar interstate element for transmission or travel. The record also reflects that in addition to their interception equipment, agents were using a pen register device which should have enabled and did enable them to know in advance whether the call being made had an intra or inter-state character. In spite of their ability to discern the character of the calls being made from the phones which were tapped, the agents monitored all calls and each of the petitioners was the victim of solely intrastate interceptions. Thus, as illustrated by this record, Title III effectively permits a general warrant to search and far too excessive discretion in the officer executing the court's interception order. *Entick v. Carrington*, 19 How. St. Trials 1029 (1765); *Boyd v. United States*, 116 U.S. 616 (1886); *Harris v. United States*, 331 U.S. 145, 157, 158 (1947).

Title III does not satisfy the Fourth Amendment's warrant-particularity requirement for what is to be legally seized. *Berger v. New York*, 388 U.S. 41 (1967). Title III allows law en-

forcement officers to listen for all conversations that may fit the description of the types specified in the order. Section 2517 (5) expressly permits retroactive judicial ratification of the seizure of evidence of other offenses and thus violates this court's holding in *Marron v. United States*, 275 U.S. 192, 196 (1927). Judicial supervision of the intrusion is not even mandatory. 18 U.S.C.A. section 2518(6).

By authorizing secret searches of telephone conversations, the petitioners submit that Title III intrudes upon that zone of the citizen's privacy wherein he has had a reasonable expectation of being apart from governmental meddling. This zone of privacy the court has protected under both the Fourth and Ninth Amendments. *Boyd v. United States*, 116 U.S. 616 (1886); *Stanley v. Georgia*, 394 U.S. 567 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965). Title III also permits the seizure of testimonial evidence in violation of the petitioners' Fifth Amendment rights. *Warden v. Hayden*, 387 U.S. 294, 320 (1967). Finally, the petitioners submit that Title III is unconstitutional because it encourages secret searches and fails to mandate prompt notice or any notice at all to those subjected to clandestine wire intrusions. Under Title III, persons not named in the order have no right to be notified of any interception. 18 U.S.C.A. section 2518(8)(d). Consequently, a person may be "legally" tapped; the information gleaned from the tap used surreptitiously against him; and he will never know it. Hardly, the petitioners submit, a set of circumstances contemplated by the framers of the Bill of Rights.

> I also share the opinion of Mr. Justice Brennan that the fantastic advances in the field of electronic communication constitute a great danger to the privacy of the individual; that indiscriminate use of such de-

vices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments; and that these considerations impose a heavier responsibility on this Court in its supervision of the fairness of procedures in the federal court system. *Lopez v. Unitel States*, 373 U.S. 427, 441 (1963) (concurring opinion of Mr. Chief Justice Warren).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Petitioners

Vincenzo Consiglio
BY .....
W. Paul Flynn

Gary Zimmerman
BY .....
Robert C. Mirto

John Laudano
BY .....
Milton I. Caplan

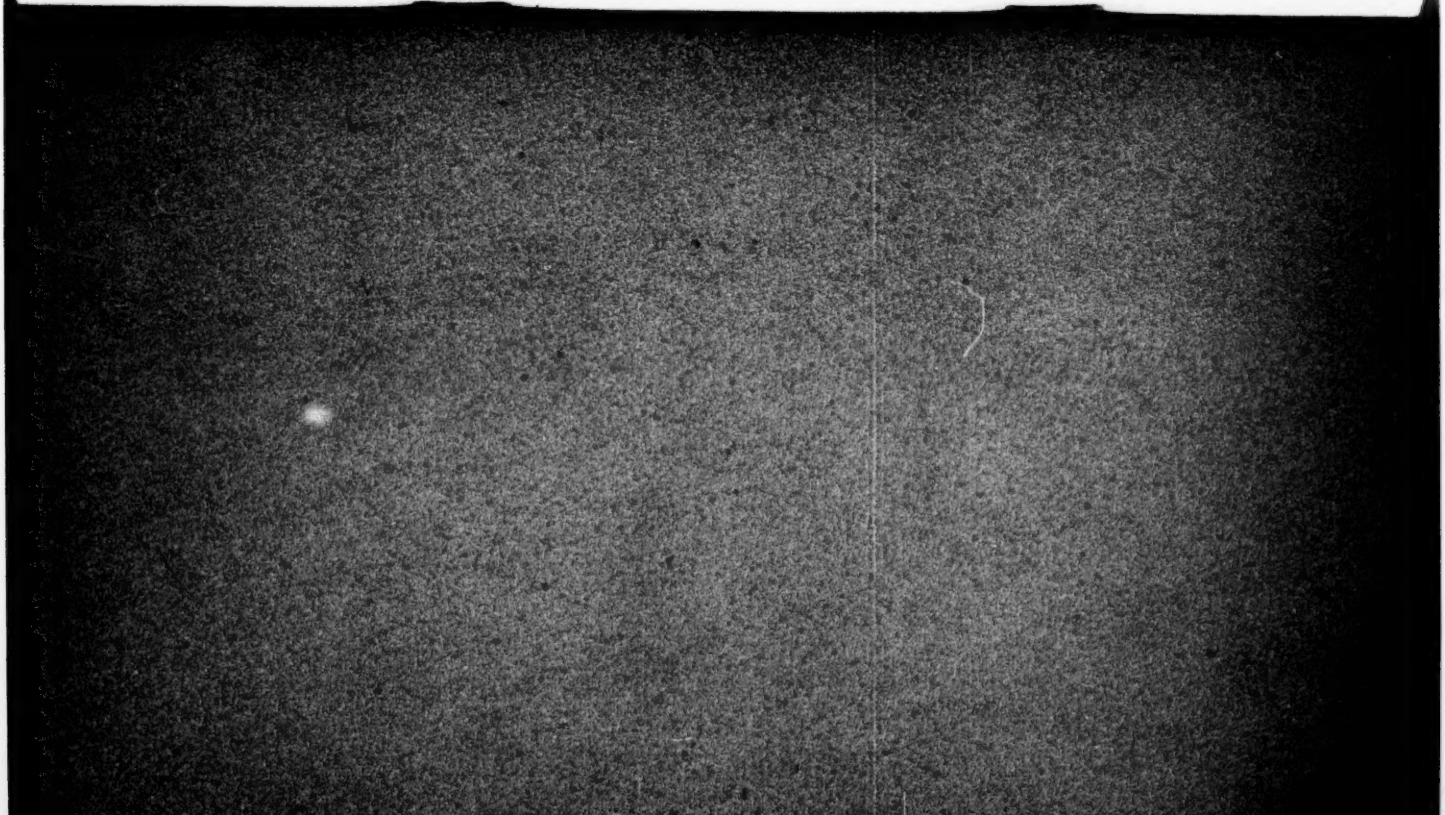
Fred Campagnuolo
BY .....
Joseph A. Licari

James DeNegris
BY .....
J. Daniel Sagarin

CERTIFICATION

This is to certify that copies of the foregoing petition were mailed this 7th day of December, 1973 to the Honorable Solicitor General, United States Department of Justice, Room 5612, Washington, D.C., and to Paul Coffey, Esq., Special Attorney, Dept. of Justice, 450 Main Street, Hartford, Conn.

W. Paul Flynn



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In the

Supreme Court of the United States

October Term, 1973

No. 73-903

VINCENZO CONSIGLIO
GARY ZIMMERMAN
JOHN LAUDANO
FRED CAMPAGNUOLO
JAMES DeNEGRIS
Petitioners

vs.

UNITED STATES OF AMERICA
Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Docket No. 73-1463

UNITED STATES OF AMERICA,
Appellee,

—against—

VINCENZO CONSIGLIO,
GARY J. ZIMMERMAN,
JOHN LAUDANO,
FRED CAMPAGNUOLO,
JAMES DeNEGRIS,
JOSEPH DiPIETRO,
Appellants

Order
affirming the judgments
of the United States
District Court for the
District of Connecticut

The judgments of conviction entered in the United States District Court for the District of Connecticut, M. Joseph Blumenfeld, *Chief Judge,* are affirmed. Appellants' principal argument on appeal relates to the proper authorization of the wire interceptions under Section 2516 of Title 18, United States Code. This issue has been before this Court repeatedly and we have continued to follow *United States v. Pisacano,* 459 F. 2d 259 (2d Cir. 1972). The other points on appeal are without merit. The mandate is stayed pending application for certiorari pursuant to Rule 41(b), Rules of Appellate Procedure.

William Hughes Mulligan /s/
William Hughes Mulligan
J. Joseph Smith /s/
J. Joseph Smith
James L. Oakes /s/
James L. Oakes,
C.JJ.

October 12, 1973

UNITED STATES v. CONSIGLIO

Cite as 342 F. Supp. 556 (1972)

RULING ON DEFENDANTS' MOTION TO SUPPRESS DISMISS

CLARIE, District Judge.

All of the defendants have been indicted for both substantive and conspiracy violations of the interstate gambling laws. They have moved pursuant to 18 U.S.C. § 2518(10) (a) to suppress evidence accumulated against them by the interception of wire communications on the ground that the applications for wiretap orders were not properly authorized under 18 U.S.C. § 2516(1).[1] The Court concludes that the Government did in fact comply with the wiretap authorization statute and the defendants' motions to suppress and dismiss are accordingly denied.

Statement of Facts

On February 18, 1970 and April 7, 1970, in Miami, Florida and Hartford, Connecticut respectively, Special Attorneys of the Department of Justice submitted sworn applications to United States District Judges for orders permitting the interception of wire communications pursuant to 18 U.S.C. § 2518.

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[1] 18 U.S.C. § 2516(1) reads in pertinent part as follows:

"The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made . . . ."

The sworn applications in both cases included a paragraph 2, which substantially reads as follows:

> "2. Pursuant to the powers conferred on him by Section 2516 of Title 18, United States Code, the Attorney General of the United States, the Honorable John N. Mitchell, has specially designated the Assistant Attorney General for the Criminal Division of the Department of Justice, the Honorable Will Wilson, to authorize affiant to make this application for an order authorizing the intercepton of wire communications. The letter of authorization signed by the Assistant Attorney General is attached to this application as Exhibit A."[8]

Exhibit A in each case purports to be a letter addressed to the attorney presenting the application and signed by "Will Wilson, Assistant Attorney General." It asserted that, after reviewing the request for permission, together with the surrounding facts and circumstances, Wilson had made certain findings of probable cause. Based upon these findings, and acting under the power of the Attorney General, which the latter had specially delegated to him, under 18 U.S.C. § 2516, Wilson thereupon authorized the named government attorney to apply for the interception order.

The United States District Judges in each instance found probable cause and granted the applications. In conformity with the requirements of § 2518(4) (d), the interception orders stated certain findings, one of which was that the Application presented to the Court had been

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[8] The language quoted is from the Connecticut application. Paragraph 2 of the Florida application is worded slightly differently.

" . . . authorized by the Assistant Attorney General for the Criminal Division of the Department of Justice, the Honorable Will Wilson, who has been specially designated by the Attorney General of the United States, the Honorable John N. Mitchell, to exercise the powers conferred on him by Section 2516 of Title 18, United States Code."

On January 5, 1972, however, the Government upon learning that Will Wilson had not in fact personally signed the authorization, confessed error. It disclosed that Will Wilson had not personally authorized either application, and further that he had not signed either of the letters which had been submitted to the issuing judges. The affidavit of Henry E. Petersen, who at the time in question was a Deputy Assistant Attorney General in the Criminal Division and now Chief of the Criminal Division, indicated that Mr. Petersen signed the name of Will Wilson to the authorization communications to the attorneys in the field. Sol Lindenbaum, the Executive Assistant to the Attorney General of the United States, stated in an affidavit that the Attorney General himself had personally approved the requests for authority to apply for the wiretaps in this case. His affidavit referred the Court to the "personally initialed" memorandums of the Attorney General to Will Wilson, "specially designating him to authorize" the attorneys in the field to apply for the interception orders. Copies of the Attorney General's authorizations for wiretaps to Will Wilson, in both Florida and Connecticut respectively, are included in the appendix to this opinion.

Mr. Petersen in a supplementary affidavit set forth the routine administrative procedures regularly followed by the Justice Department in authorizing these wiretap applications. The

requests to make such applications to the courts were required to be approved by the Attorney General himself, by his personally initialing each approved authorization; and the letters of notification to the applicant field attorney, that he had been authorized to present the applications to the court, were sent to him over the name of "Will Wilson," the head of the Criminal Division. Mr. Petersen stated that he had been authorized by Mr. Wilson to sign Will Wilson's name, to these notifications of authorization letters, in each instance where the Attorney General had previously personally initialed his approval of the wiretap.

It is the Government's position that the discretionary act of authorization required by § 2516(1) was performed by the Attorney General himself, when he personally initialed the memorandum to Will Wilson. The letters from Will Wilson, in fact signed by Henry Petersen, to the attorneys in the field, were merely ministerial notifications of the authorizations which had been approved by Attorney General Mitchell himself.

The defendants attack the Government's authorization claims on several grounds:

(1) The Lindenbaum and Petersen affidavits are inadmissible to factually establish that Attorney General Mitchell personally initialed these memorandums because the affidavits (a) constitute hearsay, (b) they purport to establish the authority of the affiants to act as agents solely through their own self-serving assertions, (c) they state conclusions of law, and (d) they purport to set forth facts known to the affiants without establishing a proper foundation;

(2) even assuming the Attorney General personally ini-

tialed the memorandums, there is no evidence to indicate that he evaluated and carefully screened the requests for authorization to make the wiretap applications;

(3) by virtue of the specific representation to the issuing judges that Will Wilson authorized the wiretap applications, the Government is estopped from now asserting that Attorney General Mitchell himself made the discretionary decision to authorize;

(4) by knowingly misrepresenting to the issuing judges the identity of the official authorizing the applications, Mr. Petersen misrepresented material facts to the courts, and these misrepresentations warrant the Court's refusing to accept the Government's changed position; and finally,

(5) the evidence stemming from the Florida wiretap should be suppressed, because the Government did not present to the judge who ordered that wiretap, any evidence from which he could have concluded that Mr. Mitchell actually authorized the application,* and the Connecticut wiretap should also be suppressed, because the probable cause for its issuance was tainted by evidence arising from the improper Florida wiretap.

Question Presented

Whether the evidence obtained by the interception of elec-

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*The Government did present to the issuing judge in Connecticut the initialed memorandum of Mr. Mitchell to Mr. Wilson. But the Government's theory of authorization at that time, accepted by the issuing judge, was that Mr. Wilson had authorized the application, pursuant to the authority granted to him by Mr. Mitchell to make that decision, in accordance with § 2516(1). Although the Attorney General personally initialed a similar memorandum authorizing the Florida wiretap, that memorandum was not presented to the issuing judge.

tronic communications under Title III, Omnibus Crime Control and Safe Streets Act of 1968 (82 Stat. 211) is subject to suppression on the ground that the applications for interception orders were not properly authorized within the meaning of 18 U.S.C. § 2516(1).

Discussion of the Law

While there may be some justification for counsel's criticism of the loose administrative procedures used by the Government in processing wiretap authorizations, the recent decision by the Court of Appeals in United States v. Pisacano, 459 F.2d 259 (2d Cir. April 7, 1972) has laid down the rule of law to be followed in this Circuit on such matters and is largely dispositive of the issues raised here. Under a different procedural background, the Court decided that the district judge did not abuse his discretion in refusing to permit the defendants to withdraw guilty pleas after they became apprised of the decision of the Fifth Circuit in United States v. Robinson (5th Cir. Jan. 12, 1972) (No. 71-1058). In deciding that question, the Court in *Pisacano* "concluded that the Justice Department's procedures were very likely consistent with the mandate of § 2516(1)." *Pisacano, supra*, 459 F.2d at 264 n. 5. The disclosure of the Justice Department's routine administrative procedures presented to the *Pisacano* court was essentially the same as that which is now set forth by the Government here.

[1] The Court of Appeals requested the Government to furnish the *Pisacano* court with affidavits setting forth the Justice Department's structural handling of the request for au-

thorization to make the wiretap application. These affidavits[4] indicated that the Attorney General himself initialed and approved the request for authorization, and that Mr. Wilson was "designated" by the Attorney General simply to perform the "ministerial act" of physically authorizing the attorneys in the field to make the application. The Court of Appeals indicated no reluctance to accept the affidavits as proper evidence of the Justice Department's procedures. It is, of course, significant that the affidavits in no way bear upon the guilt or innocence of the defendants, but concern only preliminary matters of administrative procedure. The Court concludes that the affidavits filed in this case are similarly admissible for this limited purpose. *See also,* United States v. Robinson, supra, United States v. Doolittle, 341 F.Supp. 163 (M.D. Ga. Feb. 11, 1972). The Court further finds that these affidavits constitute a sufficient proof of the genuineness of the Attorney General's signature. Approval by initialing is an administrative method commonly followed by the judges of the Court of Appeals itself.

[2, 3] The defendants also question whether there is sufficient evidence to indicate that the Attorney General properly authorized the requests to make the application. The defendants contend that the legislative history of Title III of the Omnibus Crime Control and Safe Streets Act of 1967 demonstrates that the intent of the statute was to require a careful evaluation and screening of such requests by the Attorney General or a specially designated Assistant Attorney General. The Government is under no duty to establish the degree of consideration which

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[4] The Court referred specifically only to an affidavit submitted by Mr. Lindenbaum. *Pisacano, supra,* at 261. The official court file reveals that Mr. Petersen and Mr. Wilson also submitted affidavits, and that Mr. Mitchell did not.

the Attorney General gave the requests. In *Pisacano*, the Court of Appeals concluded that the Attorney General's initialing the authorization memorandum was sufficient:

> "The August 12 and 27 requests were approved by the Attorney General himself, in the first case by his initialing a memorandum, and in the second by specific telephone authorization to Mr. Lindenbaum to do so. Clearly these complied with § 2516(1), no matter how strictly read." *Pisacano, supra*, 459 F.2d at 263.

See also, United States v. Doolittle, *supra*.[8] In accord with the intent of § 2516(1), the Attorney General, a politically responsible official, exercised his discretion, centrally formulated, in deciding to authorize these applications. United States v. Robinson, *supra*.

[4] The defendants further argue that because the Government represented to the issuing judge that Mr. Wilson authorized the wiretap applications, it is now estopped from asserting that the Attorney General himself did so. This argument must fail because the defendants have not shown any prejudice to them, which stems from their reliance upon the Government's initial representations.[9] "The essential element of a misleading

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[8] In *Doolittle*, the Court pointed out that "(t)he requirement of § 2516(1) is simply that the Attorney General 'authorize an application.' The method and manner of his authorizing is not prescribed."

[9] Along the lines of their estoppel argument, the defendants contend that the "misrepresentation" of the Justice Department, particularly of Mr. Petersen who signed Mr. Wilson's name to the letter, which appeared to be the actual authorization, should preclude this Court's crediting the position now advanced by the Government. The affidavits submitted indicate that the authorization was in fact made by the Attorney General; it would, therefore, in no way have benefited the Government to deceive the Court into thinking that the Assistant Attorney Gen-

of (defendants) to their harm is strikingly absent." Spivak v. United States, 370 F.2d 612, 615 (2d Cir. 1967), cert. denied, 387 U.S. 123, 87 S.Ct. 1690, 18 L.Ed.2d 625 (1967). *See also,* Freedman v. The Concordia Star, 250 F.2d 867, 869 (2d Cir. 1958); Talanoa v. Immigration and Naturalization Service, 397 F.2d 196, 200-201 (9th Cir. 1968). It is therefore unnecessary to decide whether, if otherwise applicable, estoppel is a good defense against the United States in a criminal proceeding. *See, e.g.,* Peignand v. Immigration and Naturalization Service, 440 F.2d 757, 761 (1st Cir. 1971).

[5] Finally, the defendants contend that the original Florida wiretap, and as a result that made subsequently in Connecticut which relied in part upon it, are invalid because the Government did not present to the issuing judge in Florida the personally initialed memorandum of Attorney General Mitchell. The defendants seem to attach significance to the fact that the Florida court had no evidence before it from which it could

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eral made the authorization. The Court concludes that the Department of Justice did not effect a material fraud upon this Court.

It is relevant to note that the Court in *Pisacano* concluded that the authorizations were not

> "... invalid in light of 28 U.S.C. § 2518(1) (a) & (4) (d) which require that the application and the court order indicate the officer authorizing the application. While Will Wilson was identified as the authorizing officer when in fact the Attorney General or Mr. Lindenbaum had approved the applications, this discrepancy did not meaningfully subvert the congressional scheme. The legislative history indicates that the purpose of both subparagraph (1) (a) and subparagraph (4) (d) of § 2518 was simply to ensure 'that responsibility will be fixed.' S.Rep. No. 1097, *supra,* 1908 U.S. Code Cong. & Adm. News at [pp.] 2192 & 2189. Perhaps the procedures adopted by the Justice Department were not the best for ascertaining the official who exercised the 'responsibility' for authorizing applications as prescribed in § 2516(1); but, as is evident from this case, that procedure does nonetheless ensure that the responsible official be reasonably identifiable." *Pisacano, supra,* 459 F.2d at 264, n. 5.

have concluded that the Attorney General himself authorized the application. But a reading of *Pisacano* makes it clear that the Court of Appeals was primarily concerned with whether in fact the appropriate official authorized the application. The failure to present the Attorney General's memorandum to the issuing judge in the Florida proceeding is deemed immaterial.

The motions of the defendants to suppress the wiretaap evidence and to dismiss are denied. So ordered.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA
vs Criminal No. H-24
VINCENZO CONSIGLIO, *et al*

RULING ON MOTIONS TO
SUPPRESS AND TO DISMISS

All of the defendants, except those previously severed, have moved to dismiss the indictment and to suppress the evidence obtained against them through alleged illegal wiretapping or other electronic surveillance. To present the related issues effectively, they have filed a joint memorandum of law covering their respective claims.

The basic legal claims asserted are: (1) that the statutes authorizing the wire interception under Chapter 119, U.S.C. § 2510-2520, are unconstitutional on their face and as applied to each of the defendants; (2) that the Connecticut intercep-

tions should be suppressed, because they were the direct result of prior illegal interceptions in Florida; (3) that the wire interception in New Haven, Connecticut, did not conform to the statute and the conversations intercepted and "seized" must therefor be suppressed; (4) that the interceptions were not terminated at the earliest opportunity as required by law; and, (5) that the interceptions were not made in accordance with the Court's authorization order. The Court finds that each of these claims is without legal merit and, accordingly, denies the defendants' motions to suppress the evidence and to dismiss the indictment.

On April 20, 1972, this Court denied the defendants' prior motions to suppress and dismiss. (342 F.Supp. 556 (D. Conn. 1972)). In that instance, the Court found that the Government's applications for the Florida and Connecticut interception orders were properly authorized by the Attorney General of the United States, within the meaning of 18 U.S.C. § 2516(1).

More recently, the constitutionality of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520, was challenged in another case in this District, Criminal Case No. H-203, *United States v. Romanello* (Newman, J.,), and ruled upon September 14, 1972. The Court there found that the order met the test of the statute's constitutionality. The latter case established the rule of law in Connecticut governing the constitutionalty of wire interceptions under said Act. The same constitutional issues raised by the defendants in this case have been previously considered and ruled upon adversely to the defendants in the *Romanello* decision. It would serve no useful purpose, therefore, to recapitulate the law in

the same area. While factual circumstances in each case affecting the constitutionality issue differ in some respects, they are substantially identical and this Court adopts the rule of law prescribed in *Romanello, supra,* which found 18 U.S.C. §§ 2510-2520 constitutional on their face. The Court also finds said statutes constitutional as applied in this case.

Florida Wiretap

The defendants attack the April 7, 1970, wiretap in Connecticut by claiming that a material source of the factual information, which led to the Connecticut action, was founded upon an alleged illegal wiretap action in Florida; and that the fruits of the subsequent action should be excluded under "the fruits of the poisoned tree" doctrine. *See*: *Silverthorne Lumber Co. v. United States,* 385 U.S. 385, 392 (1919); *Wong Sun v. United States,* 371 U.S. 471, 485, (1962).

On February 18, 1970, Judge Eaton in the Southern District of Florida reviewed the affidavits of Government Attorney Gary Betz of the Justice Department, found probable cause, and issued an order authorizing the interception of the wire communications of the defendants DePietro and Campagnuolo over a ten (10) day period at two specified telephones located in the apartment occupied by them in West Palm Beach, Florida. The wiretaps commenced on February 19, 1970, and terminated February 26, 1970, subject to a five (5) day oral progress report to the Court. (Tr. 34; July 12, 1972). In the course of these interceptions, not only were the conversations of the two named defendants subject to the tap intercepted and identified, the conversations of a stranger, identified as "Jimmy," Vincenzo Consiglio, at New Haven, Connecticut, were also intercepted.

When the time arrived to conform government action in the Florida telephonic interception with the requirements of 18 U.S.C. § 2518(8)(d), by filing an inventory of the intercepted conversations within the statutory ninety (90) day period from the termination date of the interception, Judge Eaton signed a supplemental order on May 19, 1970, requiring that said inventory be served by the marshal upon the subjects of the original wiretap order, namely, DePietro and Campagnuolo. No limitation date on the return of that service was set in the Court's order; and Campagnuolo was served on July 1, 1970, while DePietro was served on July 15, 1970. Consiglio was never a named subject of the Florida wiretap and was not included in the Judge's inventory order. Government Attorney Betz stated that he believed that Consiglio's conversations had been overheard but, because he was not a named subject in the authorization, he also believed that service was not required under § 2518(8)(d). For this reason, it was not called to the attention of the Judge. Moreover, Agent Cloherty testified "A suspicion was that it was Consiglio. But, definitely that Jimmy was Consiglio, no." (Tr. 54; January 4, 1972).

The defendants contend that this mistake, in respect to post-search notice, caused the Florida wiretap to become unlawful not only because DePietro and Campagnuolo were not actually served within the ninety (90) day limitation period, but because Consiglio was never served in that proceeding. They further claim that, if the Florida wiretap was thus unlawful, the Connecticut wiretap must be suppressed because of its prior contamination.

The present case is readily distinguishable from *United States v. Eastman,* 329 F.Supp. 1038 (M.D. Penn. 1971), since

Judge Eaton actually signed the order, causing the inventory to be served, eighty-two (82) days after the Florida wiretap was terminated. While admittedly, these inventories were actually received by DePietro and Campagnuolo after the ninety (90) day period had run, there has been no showing, or even a suggestion, that they were in any way materially prejudiced by the failure of a timely notice within the prescribed time. The delay was not of such dimension as would constitute a constitutional or statutory barrier affecting the action's validity.

The defendants' reliance upon Eastman is misplaced. In that case, the judge who granted the wiretap authorization actually "waived" the service of the inventory contrary to the statute.

> "In *United States v. LaGorga*, 336 F.Supp. 190, (W.D. Pa. 1971), it was held that absent a showing of prejudice filing a delayed inventory was permissible . . . The touchstone of our decision on this aspect of the case at bar is not one in which an inventory was delayed but rather is one in which specific provisions of Title III were deliberately and advertently not followed. In other words, the failure to file the notice or inventory is no mere ministerial act. It resulted from a judicial act which on its face deliberately flouted and denigrated the provisions of Title III designated for the protection of the public." *United States v. Eastman*, 465 F.2d 1057, 1962 (1972).

Here the statute was substantially complied with and notice was given, so that the defendants had an adequate opportunity to protect their interest my moving to suppress. They have shown no prejudice arising out of any lack of timely notification.

> "The appellees had adequate notice in this case, and they have not shown that any prejudice resulted from

the failure of the Government to formally serve them with the inventories. *See* United States v. LaGorga, 336 F.Supp. 190, 194 (W.D. Pa. 1971); United States v. Lawson, 334 F.Supp. 612, 616-617 (E.D. Pa. 1971).

> "Inasmuch as the statute has been substantially complied with in that the appellees had actual notice and the appellees have not been prejudiced by the delay in formal notification, the evidence should not have been suppressed." *United States v. Wolk*, 466 F.2d 1143, 1146 (8 Cir. 1972).

The defendants further represent that, since the inventory of the Florida wiretap was never served on the defendant Consiglio at New Haven, it became invalid as to him and constituted an unlawful source of information on which the Government relied to apply for the Connecticut wiretap. Paragraph 5 of the Connecticut application, dated April 7, 1970 (Government's Exhibit "C"), does make reference to the Florida wiretap disclosures relating to Consiglio. However, as hereinbefore noted, Consiglio was not a named subject in the Florida wiretap authorization. The relevant section of that statute, 18 U.S.C. § 2518(8)(d), provides,

> "[T]he issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include . . . ."

Thus only the named subjects of the court wiretap order itself are affirmatively required by statutory directive to be served with an inventory of their intercepted telephone calls. Since Consiglio, at New Haven, was never a named subject in the Florida wiretap order, the court had the authority to deter-

mine with reasonable certainty the identity of additional "overheard parties," if any, whose conversations had been intercepted and who might be entitled to receive service of the inventory in the interests of justice. In view of the action taken, it would appear that the court did, in fact, exercise such discretion by including only the named subjects of its order, without seeking out or adding other possible identifiable parties to the conversations, more specifically, Consiglio, at New Haven. The Court finds that the Florida District Court's action was not an abuse of discretion such as would invalidate the order.

Title 18, U.S.C. § 2518(9) affords each defendant adequate protection against prejudicial use of the acquired interception at trial.

> "The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information."

Consiglio did, in fact, ultimately learn of the Florida wiretap through a complete inventory disclosure of the Connecticut tap. All of the relevant facts, together with the actual tapes of the interceptions in Florida over DePietro's and Compagnuolo's phones, were provided by the Government. He has been able

to move for a timely suppression hearing challenging their validity as one source of the Connecticut court's order. The evidence discloses no prejudice, or other materially harmful effects, which may have operated to deprive Consiglio of an opportunity to present fully all legal challenges which might affect his prosecution or defense in this case. The Court also finds that the affidavits submitted to Judge Eaton were factually supported and legally adequate to justify his finding probable cause to issue the interception order. (Tr. 129, 134, 136-7, 149, 152, 188; July 12, 1972).

Connecticut Wiretap

The Connecticut wiretap interception was authorized on April 7, 1970, to cover a maximum fifteen (15) day period, subject to a progress report being given to the Court on the fifth and tenth days following the order. This latter provision afforded an effective judicial supervision over the progress of the order's objective and that of the subsequent order allowing the continuance of the interception. Pursuant to the progress report, the Government on April 13, 1970, presented the Court with evidence concerning the contents of the incoming and outgoing calls from April 8, 1970, through the first four (4) day period. In this manner the Court maintained continuous supervision over the progress of the Government's actions and, after an ex parte hearing found probable cause to permit the original order to remain effective until April 17, 1970. The latter termination date was in fact five days prior to the original date set. The transcript, and the related exhibits covering the period from the initiation of the Connecticut wiretap to its conclusion, confirms the existence of probable cause to warrant the continuance of the interception.

"Probable cause under the Fourth Amendment exists where the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed." *Berger v. New York,* 388 U.S. 41, 55 (1967).

While the defendants assert that the Court's order was too broad and that, since the crime alleged involved the unlawful use of interstate wire facilities, the order should have been limited solely to monitoring interstate phone calls, such claims are ill-founded. The very nature of the crime being investigated necessitated that all calls relating to wagering should be screened so as to disclose fully what schemes were being used to handle and transmit wagering information, and to reveal the identity of those involved in the suspected conspiracy.

The defendants argue also that the order of the Connecticut court is defective, because it failed to make all the requisite findings enumerated under the statute, 18 U.S.C. § 2518(3) (a) through (d). They claim that, while the agents' affidavit alleged that Consiglio was engaged in a conspiracy in violation of 18 U.S.C. § 371, the order omitted the phrase "and others as yet unknown" in line 9 of Paragraph (a). Conspiracy by its very definition connotes participation by at least two or more persons in the criminal activity alleged. The Government's application adequately described the crime under investigation as a conspiracy, and this is supported by the agents' affidavit of the alleged acts of criminal conduct.

Prior to issuing the wire interception order, this Court found that all reasonable investigatory procedures had been utilized, but that none appeared likely to succeed in obtaining

the required information. In this respect, the order not only conforms with the objectives of the statute, 18 U.S.C. §2518(3)(c), but it is supported by the sequence of factual events. The investigating agents set forth in their affidavit that they had relied upon information furnished by several police informants; and that the latter had actually observed, or had been personally told by the subjects themselves, the relevant facts. This information was subsequently corroborated by both the telephone company's toll records, which had lawfully been procured, and by police physical surveillance and observation. The totality of the evidence indicated that the defendant Consiglio was exchanging information and/or wagers with bookmakers in Massachusetts, New Jersey, and Florida, and sources of "line information" outside Connecticut. (Tr. 20, 25, 54, 121, 122, 123, 128, 143-4; July 14, 1972; and Tr. 79, 84, 116; July 18, 1972.

In *Smith v. United States,* 358 F.2d 833, 837 (D.C. Cir. 1966), *cert. denied,* 386 U. S. 1008 (1967), then Judge, now Chief Justice Burger stated:

> "As we have often observed, probable cause is the sum total of layers of information and the synthesis of what the police have heard, what they know, and what they observe as trained officers. We weigh not individual layers but the 'laminated' total. It has often been repeated, but it bears repetition, that 'In dealing with probable cause, . . . as the very name implies, we deal with *probabilities.* These are not technical; they are the factual and practical conditions of every day life on which reasonable and prudent men, not legal technicians, act.' Brinegar v. United States, *supra,* 338 U.S. at 175, 69 S.Ct. at 1310, 93 L.Ed. 1879."

Also see, United States v. Harris, 403 U.S. 573, 580 (1970), and *Raffone v. Adams* ,468 F.2d 860 (2d Cir. 1972).

The defendants complain that the finding was defective, because the Government did not make specific findings as to the exhaustion and inadequacy of all normal investigative procedures, 18 U.S.C. § 2518(3)(c). They claim that the findings should specifically assert or demonstrate that the Government utilized the Grand Jury and found it to be inadequate as an investigatory tool; that they failed to use actual bettor-participants upon whom they might confer the the benefit of immunity from criminal prosecution; that they did not exhaust the sources of the confidential informants, who could be compelled to testify absent a showing of physical danger or reprisal; and finally, that the Government failed to exhaust all undercover techniques.

The Court did, in fact, find that the Government had adequately pursued all reasonable police procedures likely to prove effective. Anyone reasonably familiar with investigatory techniques used to investigate this type of unlawful activity, is cognizant that one wrong contact or suspicious act can permanently destroy months of police work. This is especially true where the crime charged involves the interstate wire transmission of wagering information. The Government affidavit and the supportive facts in evidence adequately demonstrate the representation made to the Court; that normal procedures had not been successful in the past, nor were they likely in the future to obtain the type of evidence necessary for a successful court prosecution, (Tr. 149, 150; July 12, 1972; Tr. 80-81, July 14, 1972). This Court finds that the type of surveillance ordered in this type of interstate case was a reasonable and necessary investigatory tool under 18 U.S.C. § 2518(c), and that the facts support and justify its use.

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The defendants further challenge the scope of the interceptions, because they were not minimized by more restrictive limitations in the orders itself and its execution, or terminated at the earliest opportunity, as provided under 18 U.S.C. § 2518 (5). They point out that on occasions when Consiglio was known to be at the Hi-Way Diner, the interceptions at his home continued. Similarly, it is claimed that, although there were instances when the interception disclosed that he was not actually using the phone at the Hi-Way Diner, the monitoring nevertheless continued.

The record indicates that the two home telephones, as well as the phone at the diner, were regularly used for the transmission of wagering information during the interception period. Government counsel has aptly responded that, out of approximately one hundred eighty (180) intercepted calls, the defendants can single out only one (1) as having been impermissibly intercepted. That involved Consiglio's wife's discussion with a stock broker concerning a financial matter wherein it was not possible to verify that it was unconnected with wagering until the conversation's conclusion. Furthermore, it disclosed that when Consiglio was not at home, his wife did on occasion place wagers in her husband's absence.

The Court's limitation on interceptions at the diner, to the period when Consiglio was actually there and when the call involved gambling was reasonably followed. On all but three (3) gambling calls, Consiglio either personally placed or reeived the call. On two of these calls, the agents identified Consiglio's voice in the background, purportedly giving instructions to the phone user. The third call involved Consiglio himself, in that he took over the conversation from one of the original

parties. The order was ultimately terminated five days prior to the original limitation date. It was the earliest practicable opportunity, and the interceptions were minimized in their execution in accordance with the Court's order. (Tr. 98, 99; July 19, 1972).

The defendants have raised a number of other trivial issues, which the Court has considered and has determined to be without merit. The motions to suppress and to dismiss are denied.

SO ORDERED.

Dated at Hartford, Connecticut, this 24th day of January, 1973.

T. Emmet Clarie
United States District Judge

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA
v. Cr. No. H-24
VINCENZO CONSIGLIO, *et al*

AFFIDAVIT

District of Columbia:

Henry E. Petersen, being duly sworn, deposes and says:

I am Acting Assistant Attorney General in charge of the Criminal Division, United States Department of Justice.

I signed the name of Will Wilson, Assistant Attorney General, Criminal Division, to the following communications notifying the named individuals that they were authorized to make court applications under Title 18, United States Code, Section 2518, for interception orders:

a. A letter to Gary L. Betz, dated February 13, 1970, relating to certain telephones in West Palm Beach, Florida, allegedly utilized by Joseph DiPietro and others; and

b. A letter to David Margolis, dated April 6, 1970, relating to certain telephones in New Haven, Connecticut, allegedly used by Vincenzo Consiglio.

At those times when I signed the above letters, I was a Deputy Assistant Attorney General in the Criminal Division and acted in accordance with the authorization of Will Wilson and the standard procedures of the Criminal Division. The signing of Will Wilson's name was in conformity with the standard procedure of dispatching such a letter in every case in which Will Wilson had been specially designated on an *ad hoc* basis to authorize the applicant to make the application.

HENRY E. PETERSEN
Acting Assistant Attorney General
Criminal Division

Subscribed and sworn to before me
this 14th day of December, 1971.

Audrey Ann Crump

My Commission Expires August 31, 1976

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

v. Cr. No. H-24

VINCENZO CONSIGLIO, *et al*

AFFIDAVIT

District of Columbia:

Sol Lindenbaum, being duly sworn, disposes and says:

I am Executive Assistant to the Attorney General of the United States.

On February 13, 1970, the Attorney General approved a request for authority to apply for an interception order with respect to certain telephones in West Palm Beach, Florida, allegedly used by Joseph DiPietro and others. Attached is a copy of his personally initialed memorandum of that date to Will Wilson, the Assistant Attorney General in charge of the Criminal Division, specially designating him to authorize Gary L. Betz to apply for an interception order.

On April 6, 1970, the Attorney General approved a request for authority to apply for an interception order with respect to certain telephones in New Haven, Connecticut, allegedly used by Vincenzo Consiglio. Also attached is a copy of his personally initialed memorandum of that date to Will Wilson specially designating him to authorize David Margolis for an interception order.

SOL LINDENBAUM
Executive Assistant to the Attorney General of the United States

Subscribed and sworn to before me
this 14th day of December, 1971.

Audrey Ann Crump

My Commission Expires August 31, 1976

UNITED STATES GOVERNMENT

DEPARTMENT OF JUSTICE

Memorandum

Date: April 6, 1970

JNH:DEH:skh

TO: Will Wilson
Assistant Attorney General
Criminal Division

FROM: John N. Mitchell
Attorney General

SUBJECT: Interception Order Authorization

This is with regard to your recommendation that authorization be given to David Margolis to make application for an interception order under 18 U.S.C. 2518, permitting the interception of wire communications for a fifteen (15) day period from telephones numbered 203-624-5223 and 203-624-5579, in service at the residence of Vincenzo Consiglio, 3 Brown Street, New Haven, Connecticut, and telephone number 203-777-9479, in service at the Hi-Way Diner, 95 Water Street, New Haven,

Connecticut, in connection with the investigation into possible volations of 18 U.S.C. 1084, 1952 and 371 by Vincenzo Consiglio.

Pursuant to the powers conferred on me by Section 2516 of Title 18, United States Code, you are hereby specially delegated to authorize David Margolis to make the above-described application.

UNITED STATES GOVERNMENT

DEPARTMENT OF JUSTICE

DATE: Feb. 18, 1970

JNM:JCC:lrt

TO: Will Wilson
Assistant Attorney General
Criminal Division

FROM: John N. Mitchell
The Attorney General

SUBJECT: Interception Order Authorization

This is with regard to your recommendation that authorization be given to Gary L. Betz, Special Attorney, Miami Strike Force, to make application for an interception order under 18 U.S.C. 2518, authorizing the Federal Bureau of Investigation to intercept wire communications for a ten (10) day period to and from two telephones, one subscribed to by Patrick DiPietro and the other subscribed to by Frank Perriccello, c/o Fred Campo, both located in the premises rented by Fred Campagnuolo, a/k/a Fred Campo at Apartment D-3, 4500 North Dixie Highway, West Palm Beach, Florida, and bearing numbers

844-7900 and 842-7332, respectively, in connection with the investigation into possible violations of 18 U.S.C. 1084, 1952, and 371, by Joseph Patrick DiPietro, a/k/a Patrick DiPietro, and Fred Campagnuolo, a/k/a Fred Campo, and others as yet unknown.

Pursuant to the powers conferred on me by Section 2516 of Title 18, United States Code, you are hereby specially designated to authorize Gary L. Betz, Special Attorney, Miami Strike Force, to make the above-described application.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA
vs. Criminal No. H-24
VINCENZO CONSIGLIO, *et al*

SUPPLEMENAL MOTION OF DEFENDANT, JOSEPH DiPIETRO, FOR DISCOVERY AND INSPECTION
(Adopted by All Parties)

Following upon the Affidavits of Henry Petersen, now acting Assistant Attorney General, Criminal Division, and Sol Lindenbaum, Executive Assistant to the Attorney General of the United States, both dated December 14, 1971 and recently filed in this case by the Government, the defendant, Joseph DiPietro, represents that the information sought herein is now necessary to his defense and he moves pursuant to the Constitution of the United States, The Federal Rules of Criminal Procedure, and the inherent power of this court to supervise the administration

of criminal justice within its precincts for an order requiring the Government to respond to the following requests for disclosure and to provide to the undersigned copies of the following items:

1. Please state whether the "recommendation" referred to in the Memorandum dated February 13, 1970 from John N. Mitchell, the Attorney General, to Will Wilson, Assistant Attorney General, Criminal Division, was made orally or in writing.

2. Please state whether Will Wilson personally made the "recommendation" referred to in the Memorandum and if not, who was personally responsible for making the "recommendation."

3. Please state if the "recommendation" was made to the Attorney General personally and if not, the name of the person to whom it was made.

4. If the "recommendation" referred to in the said Memorandum was made in writing, please state the name of the person who signed that "recommendation" and please provide a copy thereof to the undersigned.

5. If the "recommendation" was made orally, please state substantially the contents of the "recommendation."

6. With reference to the Government's application in this case to the United States District Court, Southern District of Florida, for authorization to intercept wire communications, please summarize all of the activities personally performed by the Attorney General to discharge his statutory duties under Title 18 United States Code Section 2516.

7. Please state whether the "request" referred to in a

letter dated February 13, 1970 supposedly signed by Will Wilson, Assistant Attorney General, addressed to Mr. Gary B. Betz, Special Attorney, Miami Strike Force, Miami, Florida, and submitted to United States District Court, Southern District of Florda, in connection with the Government's application to obtain court authorization to wiretap phones allegedly used by defendants in this case was made orally or in writing.

8. Please state the name of the person to whom the "request" referred to in the said letter was made.

9. Please state if the "request" referred to in the said letter was made in writing and if so, please provide a copy thereof to the undersigned.

10. If the "request" referred to in the said letter was orally made, please report substantially the contents of such "request."

11. With reference to the letter identified in Paragraph #7 above, please state:

a. Did Will Wilson in his capacity as Assistant Attorney General actually and personally review the "request" together with "the facts and circumstances detailed therein . . ."

b. Did Will Wilson in his capacity as Assistant Attorney General actually and personally determine "that there exists probable cause to believe that the above-named persons will make use of the above-described two telephones in connection with those offenses, that wire communications concerning the offenses will be intercepted, and that normal investigative procedures are unlikely to succeed or are too dangerous to be used."

12. With reference to the Government's application in this case to the United States District Court, Southern District of Florida, for authorization to intercept wire communications, please summarze all the activities personally performed by Will Wilson in his capacity as Assistant Attorney General specially delegated by the Attorney General to discharge his (Wilson's) statutory duties under Title 18 United States Code, Section 2516.

13. With reference to the Affidavit of Henry E. Petersen dated December 14, 1971 and recently filed by the Government in this case, please state or supply:

a. When and from whom Mr. Petersen received his authorization to sign Will Wilson's name to the letters mentioned in the Affidavit.

b. Please define what is meant in the Affidavit by "the standard procedures of the Criminal Division."

c. A copy of the "standard procedures of the Criminal Division."

d. Please supply the legal authority for the efficacy for such procedures under Title 18, Chapter 119 proceedings.

14. Please provide the undersigned for inspection and copying a copy of the Manual for Conduct of Electronic Surveillance under Title III, a publication prepared by the Justice Department for the use of its attorneys and referred to in the *United States v. King*, 10 Cr.L. 2163 (SD Cal. 1971).

15. Please state the date on which Sol Lindenbaum, Executive Assistant to the Attorney General of the United States, commenced performance of his duties in that position.

16. If known to the Government, please provide the cur-

rent business and residence addresses of Will Wilson, formerly Assistant Attorney General, Criminal Division, Department of Justice.

17. Please state whether the "recommendation" referred to in the Memorandum dated April 6, 1970 from John N. Mitchell, the Attorney General, to Will Wilson, Assistant Attorney General, Criminal Division, was made orally or in writing.

18. Please state whether Will Wilson personally made the "recommendation" referred to in the Memorandum and if not, who was personally responsible for making the "recommendation."

19. Please state if the "recommendation" was made to the Attorney General personally and if not, the name of the person to whom it was made.

20. If the "recommendation" referred to in the said Memorandum was made in writing, please state the name of the person who signed that "recommendation" and please provide a copy thereof to the undersigned.

21. If the "recommendation" was made orally, please state substantially the contents of the "recommendation."

22. With reference to the Government's application in this case to the United States District Court, District of Connecticut, for authorization to intercept wire communications, please summarize all of the activities personally performed by the Attorney General to discharge his statutory duties under Title 18 United States Code Section 2516.

23. Please state whether the "request" referred to in a

letter dated April 6, 1970 supposedly signed by Will Wilson, Assistant Attorney General, addressed to Mr. David Margolis, Organized Crime and Racketeering Section, United States Department of Justice, Hartford, Connecticut and submitted to the United States District Court, District of Connecticut, in connection with the Government's application to obtain court authorization to wiretap homes allegedly used by defendants in this case was made orally or in writing.

24. Please state the name of the person to whom the "request" referred to in the said letter was made.

25. Please state if the "request" referred to in the said letter was made in writing and if so, please provide a copy thereof to the undersigned.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

vs. Criminal No. H-24

VINCENZO CONSIGLIO, *et al*

MOTION OF DEFENDANT, JOSEPH DiPIETRO, RE: SUBPOENAS FOR WITNESSES

(Adopted by All Parties)

Joseph DiPietro, a defendant herein, pursuant to the Constitution of the United States and Rule 17(b) of the Federal Rules of Criminal Procedure, says:

1. He is unable to pay the fees of certain witnesses hereinafter named and their presence is necessary to an adequate defense during hearings before this court on pending pre-trial motions.

2. The witnesses needed by the defendant are:

a. The Honorable John N. Mitchell, Attorney General, Washington, D. C.

b. The Honorable Henry E. Petersen, Acting Assistant Attorney General — Criminal Division, Washington, D. C.

c. Will Wilson, address unknown to the defendant, formerly Assistant Attorney General — Criminal Division.

Wherefore, the defendant respectfully requests this court to order the issuance of subpoenas for the above-named witnesses.

DEFENDANT, JOSEPH DiPIETRO

Dated: January 5, 1972

By William P. Murray, Jr. /s/
William P. Murray, Jr.
40 Russ Street, Hartford, Conn.
His Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA
v. Criminal No. H-24
VINCENZO CONSIGLIO, *et al*

AGREEMENT OF UNITED STATES AND DEFENDANTS IN U.S. v. CONSIGLIO, WITH RESPECT TO APPELLATE ISSUES PRESERVED FOR APPELLATE REVIEW

The parties are reserving the following issues for appeal:

1. (a) The constitutionality of Title III on its face and as applied in this case.
   (b) Statutory compliance with 2516.

2. Statutory compliance with Title 18, United States Code, Section 2518, as follows:

Section 2518 (1) (a) is reserved on appeal.
(b) (III) (IV) is reserved on appeal.
(c) is reserved on appeal.
(d) As to the nature of the investigation is reserved on appeal; but the specific language of the application is not in issue.
(e) Is reserved on appeal.
(f) Is not part of issues reserved on appeal.

Section 2518 (2) Is not part of issues reserved on appeal.

Section 2518 (3) The appropriate basis for the finding is reserved on appeal; but whether or not the judge made a finding is not an issue on appeal.

Section 2518 (4) (c) (e) are reserved on appeal; but subsection (a) (b) & (d) are not so reserved.

Section 2518 (5) Whether the authorizing Judge should have authorized is reserved on appeal; but whether he did so authorize is no part of the appeal.

Section 2518 (6) & (7) are no part of the appeal.

Section 2518 (8) (d) is reserved on appeal; but sub-sections (a), (b) and (c) are no part of the appeal.

Section 2518(9) is not part of the appeal.

Section 2518 (10) is in only insofar as it is admitted that the parties defendant are aggrieved persons.

The New York Times, September 11, 1973, page 9

KISSINGER'S ROLE ON TAPS OUTLINED

Senate Unit Gets Memo and Hears Richardson

By DAVID BINDER

Special to The New York Times

WASHINGTON, Sept. 10 — The Nixon Administration attempted today to clarify the role played by Henry A. Kissinger in the wiretapping of 13 of his Government associates and four newsmen over a period of 21 months.

The move was made in response to a request by the Senate Foreign Relations Committee that emerged in hearings on the nomination of Mr. Kissinger to be Secretary of State.

Attorney General Elliot L. Richardson and his acting deputy, William D. Ruckelshaus, went before the committee in closed session with a three and one-half page memorandum dealing with the wiretapping that went on from May, 1969, to February, 1971.

Concern Over Leaks

According to the memorandum and to their remarks in

closed session, the genesis of the tapping program lay in the concern of Mr. Kissinger over repeated leaks in the press of classified information relating to his work as the President's national security adviser.

According to Administration sources, this is what Mr. Richardson and Mr. Ruckelshaus told the committee in closed session:

Mr. Nixon was described as sharing his adviser's anger. But it appears that Mr. Kissinger's appeal to put a stop to the leaks was what inspired formal action.

Sometime in late April, 1969, the sources said, Mr. Nixon called in Mr. Kissinger and the late Director of the Federal Bureau of Investigation, J. Edgar Hoover, to discuss the leak problem.

According to the sources, with Mr. Kissinger present, the President authorized Mr. Hoover to initiate an F.B.I. inquiry to find the leaks and stop them and, as part of the investigation, to employ "national security wiretaps" and other means of surveillance.

Names Reported Given

Mr. Kissinger and his staff aide at that time, Gen. Alexander M. Haig, Jr., supplied names of seven staff members of the National Security Council to Mr. Hoover or his deputy, William Sullivan, the sources said. They reportedly identified them as persons with access to security information and requested that they be investigated.

The sources said the next part of the procedure was for Mr. Hoover to write a request for wiretap authorization with

the name attached and the brief explanation that it had been asked for by the White House.

The requests were sent to the then Attorney General, John N. Mitchell, for approval and initialing, according to the sources, something Mr. Mitchell denied before the Senate Watergate investigators last July. The sources said that the F.B.I. had subjected Mr. Mitchell's initialings to laboratory tests and has established that they were "true and correct."

Ruckelshaus Asked Report

Some of the 17 names were described as having been generated within the F.B.I. as a result of information garnered from other wiretaps. At least one name was said to have been submitted as a result of a conversation between Attorney General Mitchell and the White House. This was thought to be John F. Sears, at the time a White House counsel.

Last May as acting F.B.I. director, Mr. Ruckelshaus ordered a comprehensive report on the 17 wiretappings after press reports appeared linking the Nixon Administration to electronic surveillance of newsmen and at least one member of the National Security Council. The report was the basis for the memorandum submitted today.

At that time Mr. Kissinger was equivocal about his role in the wiretapping, saying on May 14 that he had neither asked for nor approved the taps and, then, on May 16, admitting that he had supplied names for the list of surveillance candidates.

Persons Listed

The 17 persons selected for wiretapping either as officials

with access to "sensitive information" or potentially involved in leaking, and the newsmen who had published leaked information were:

Helmut Sonnenfeldt, Richard L. Sneider, Morton Halperin, Winston Lord, Daniel I. Davidson, Anthony K. Lake and Richard M. Moose, all of the National Security Council.

Also, Lieut. Gen. Robert E. Pursley, military aide to the Defense Secretary Melvin R. Laird; William H. Sullivan, a State Department official assigned to the Vietnam peace talks; Richard G. Pedersen, aide to then Secretary of State William P. Rogers.

Also James W. McClane and John P. Sears, White House Aides; William Safire, White House speech writer, and four newsmen, William Beecher and Hedrick L. Smith of The New York Times; Marvin Kalb of the Columbia Broadcasting System; and Henry Brandon of The London Sunday Times.

CHAPTER 119 — WIRE INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

* * *

§ 2510. *Definitions*

As used in this chapter —

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or

operating such facilities for the transmission of interstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than —

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the

United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means—

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(a) of title 47 of the United States Code; and

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

Added Pub.L. 90-351, Title III § 802, June 19, 1968, 82 Stat. 212.

* * *

§ 2515. *Prohibition of use as evidence of intercepted wire or oral communications*

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Added Pub.L. 90-351, Title III § 802, June 19, 1968, 82 Stat. 216.

§2516. *Authorization for interception of wire or oral communications*

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprison-

ment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h), or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), sections

2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influence and corrupt organizations), or section 351 (violations with respect to congressional assassinations, kidnapping and assault);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) Any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder,

kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216, and amended Pub.L. 91—452, Title VIII, § 810, Title IX, § 902(a), Title XI, § 1103, Oct. 15, 1970, 84 Stat. 940, 947, 959; Pub.L. 91—644, Title IV, § 16, Jan. 2, 1971, 84 Stat. 1891.

§2517. *Authorization for disclosuse and use of intercepted wire or oral communications*

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the

contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 217 and amended Pub.L. 91—452, Title IX, § 902(b), Oct. 15, 1970, 84 Stat. 947.

§ 2518. *Procedure for interception of wire or oral communications*

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent

jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committting the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for intercepton should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried

and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other

person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective

and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State of subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activtities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) There are grounds upon which an order could be entered this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8) (a) The contents of any wire or oral communication

intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such ways as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7) (b) which is denied or the termination of the

period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless ecah party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall

be taken within thirty days after the date of the order was entered and shall be diligently prosecuted.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 218 and amended Pub.L 91-358, Title II, § 211(b), July 29, 1970, 84 Stat. 654.

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

v. Cr. No. H. 24

VINCENZO CONSIGLIO, *et al*

AFFIDAVIT

District of Columbia:

Henry E. Petersen, being duly sworn, deposes and says:

I am Acting Assistant Attorney General in charge of the Criminal Division, United States Department of Justice.

This affidavit supplements my affidavit of December 14, 1971, pertaining to the signing of Will Wilson's name on two letters of authorization to Gary L. Betz and David Margolis to apply for wire interception orders in this case, the letters being dated February 13, 1970, and April 6, 1970. At the times of the events related in this affidavit, I was a Deputy Assistant Attorney General in the Criminal Division.

After the two requests for authorization to make application for wire interception orders in this case, together with

copies of the pertinent affidavits and allied papers, had been reviewed by a special unit within the Criminal Division and processed through intermediate levels to me with recommendatons for approvai, I examined them and forwarded them to the office of the Attorney General with recommendations that the authorizations be granted. *Will Wilson did not examine the files or expressly authorize an application as to either request.* Following the approval of the *requests in the office of the Attorney General,* the letters of notification to the applicant that he was authorized to present the applications to the court were sent to the applicant by the Criminal Division. *As I stated in my previous affidavit, I signed Will Wilson's name to the two letters. I regarded the signing of Will Wilson's name as a ministerial act,* because Will Wilson had authorized me to sign his name to and dispatch such letters of authorization in every instance in which the request had been favorably acted upon in the office of the Attorney General and he had been specially designated on an *ad hoc* basis to authorize an applicant to make an application for an interception order.

HENRY E. PETERSEN
Acting Assistant Attorney General
Criminal Division

Subscribed and sworn to before me
this 7th day of January, 1972.

Notary Public

Hearings before the Select Committee on Presidential Campaign Activities of the Senate on Presidential Campaign Activities of 1972,*Phase* 1: *Watergate Investigation,* 93rd Cong., 1st Sess.,

Book 4, excerpted testimony of John N. Mitchell given July 10, 1973.

Mr. Dash. But would if be fair to say, Mr. Mitchell, that it was in the interest of the group to have the story that did go into the grand jury and the ultimate indictments that did come out cut off at Liddy? And Mr. Magruder, who was in such a high position in the committee, would not be involved in that type of thing?

Mr. Mitchell. Mr. Dash, I think you are jumping from one conclusion to another without the bridge. What we were really concerned about were the White House horror stories. Now, if the cut off that you speak of helped in that direction, perhaps that was probably the case. In other words, Watergate did not have the great significance that the White House horror stories that have since occurred had.

Mr. Dash. Would you say that whatever coverup was taking place to this point, concealment and not volunteering information, had to do with actually preventing the so-called White House horror stories rather than Watergate break-in?

Mr. Mitchell. This was certainly my belief and rationale and I would believe the people in the White House, certainly some of them, might well be involved and certainly would have similar interests.

Mr. Dash. Well, did Mr. Dean, in carrying back the messages from Mr. Haldeman and Mr. Erlichman, indicate that he had in fact informed them of the actions that had been taken —the strategies performed by your group?

Mr. Mitchell. I cannot say that he did or did not. I would have to believe that Mr. Dean was reporting to those gentlemen over there. Mr. Dean, as a proper lawyer, proper counsel, was

very, very limited in his discussions of what he did or said with people in the White House and that is the way, of course, he should have acted.

Mr. Dash. I think you testified that you a least discussed with Mr. Haldeman and Mr. Ehrlichman the problems involved in the Liddy operations, the Ellsberg, and other situations?

Mr. Mitchell. Yes, and that was somewhere down the line, probably much later than the time frame of which you are talking about in relationship to Mr. Magruder's appearance before the grand jury.

Mr. Dash. All right, now, let us look very briefly to the so-called wiretapping of the journalists and Mr. Kissinger's staff as a result of the SALT talk leaks. Were you aware of the leaking and those wiretaps?

Mr. Mitchell. Mr. Dash, I find it hard to give you a specific answer other than the fact that, yes, I was. To what extent, I do not know. This happened in 1968 and they were national security wiretaps. They should have a full record of everything that was handled in the Department of Justice, because every security tap, whether it be a strict national security dealing with foreigners or whether it is the type that the court has since frowned upon, is filed in the Department of Justice.

Mr. Dash. But this would require your authority as Attorney General, would it not?

Mr. Mitchell. I would believe that the FBI would probably not operate without it. I am not sure of that, but I believe that that would be the case.

Now let me go on to point out two other things. No. 1, I do not recall there being that many people involved. I remember some members of the National Security Council that they thought were very much suspect.

The second point I would like to point out, which gives me memory problems, is that in the newspapers, counsel said that some of these were on for a year and a half or 2 years, or something to that extent. Well, we have a rule that I put in the Department that where they had these national security taps, they had to be reviewed every 90 days. So there again, I would have had a memory jog along the way if this be the case.

So what I am saying is that I think your best evidence is over in the Department of Justice and not my recollection.

Mr. Dash. Well, would the President's recollection be of assistance, Mr. Mitchell? Are you aware of the President's statement of May 22?

Mr. Mitchell. I am aware of that reference in the statement of May 22. I do not know where the information came from. It may quite conceivably be correct. I brought the matter up through correspondence with Mr. Ruckelshaus and I thought I got very fuzzy answers back. But as I say, the evidence is in the Department of Justice and you ought to have access to it.

Mr. Dash. But you do recall that in that statement of the President, the President did say that these areas did have the approval and were selected, along with others, by the Attorney General of the United States, who was you at the time?

Mr. Mitchell. Mr. Dash, I have seen a lot of statements that come out that—I am not referring to the President, but in which people who dig out the information frequently get their facts wrong.

Mr. Dash. This is a very important statement by the President on May 22.

Mr. Mitchell. I thought Mr. Buzhardt's statement was quite important as far as I was concerned, too, but I think we found out what the distinction was there.

Mr. Dash. You are suggesting Mr. Buzhardt prepared the May 22 testimony?

Mr. Mitchell. I am not suggesting anything.

Mr. Dash. Did you believe, Mr. Mitchell—and I use the term belief at this point—have any belief as to whether the President was aware of the events either prior to or after the break-in of the Democratic National Committee headquarters? When I say events, I mean the actual bugging or the coverup which took place thereafter?

Mr. Mitchell. I am not aware of it and I have every reason to believe, because of my discussions and encounters with him up through the 22d of March, I have very strong opinions that he was not.

Mr. Dash. How do you arrive at that conclusion? Was it by particular conversations with the President that he talked to you about this subject, or did you talk to him about this subject?

Mr. Mitchell. No. it is primarily—I do not want to say no to exclude it, and I will explain the natures of the conversations, if you so desire. As a matter of fact, you may go through that list and I will get a chance to do them one by one. What I

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-903

VINCENZO CONSIGLIO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 73-5730

JOSEPH PATRICK DiPIETRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the government failed to comply with the authorization, need, and notice requirements of the wire interception provisions in Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510-2520) and that the statute is unconstitutional.

After a plea of nolo contendere in the United States District Court for the District of Connecticut, prior to which petitioners reserved for appellate review the issues herein presented,[1] petitioners were convicted of being engaged in a bookmaking operation and transmitting betting information by interstate telephone calls, in violation of 18 U.S.C. 1084 and 18 U.S.C. 1952, and of conspiracy to commit these offenses in violation of 18 U.S.C. 371. Petitioners were sentenced to varying terms of imprisonment and/or fines.[2] The district court filed an opinion denying motions to suppress the wire interception evidence, 342 F. Supp. 556 (D. Conn.) (Pet. App. 2a-11a),[3] and another unreported opinion denying motions to dismiss the indictments and suppress evidence

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[1]It is the present policy of the Department of Justice not to agree to such pleas with reservation of a right to raise non-jurisdictional issues on appeal. We do not challenge the procedure here, however, since this agreement was entered into by the government attorney with the acquiescence of the trial court, and such agreements are recognized in the Second Circuit. See *United States* v. *Doyle*, 348 F. 2d 715, 717 (C.A. 2), certiorari denied, 382 U.S. 843; *United States* v. *Mann*, 451 F. 2d 346, 347 (C.A. 2). As a matter of policy, the courts of appeals in the Fifth and Sixth Circuits do not permit the preservation by agreement of appeals on non-jurisdictional grounds after pleas of guilty or nolo contendere. *United States* v. *Mizell*, 488 F. 2d 97 (C.A. 5), *United States* v. *Cox*, 464 F. 2d 937 (C.A. 6).

[2]Petitioner Consiglio was sentenced to one year's imprisonment and fined $2,500. Petitioner Zimmerman was sentenced to one year's imprisonment and fined $5,000. Petitioner Laudano was fined $750. Petitioner Campagnuolo was sentenced to eighteen months' imprisonment and fined $3,000. Petitioner DeNegris was sentenced to one year's imprisonment, with the sentence suspended; he was placed on probation for five years and fined $3,000. Petitioner DiPietro was sentenced to two years' imprisonment; the sentence was suspended, and he was placed on five years' probation and fined $1,500.

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[3]"Pet. App." refers to the Appendix in No. 73-903.

(Pet. App. 11a-23a). The Court of appeals affirmed *per curiam* on October 12, 1973 (Pet. App. 1a).[4]

The facts relating to the wire interception authorizations are set forth in the first opinion of the district court (Pet. App. 2a-5a). Briefly, the conviction in this case was based on evidence obtained from two wire interceptions authorized by federal district judges in Miami, Florida, and Hartford, Connecticut, pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968. The applications had been personally authorized for submission to the court by former Attorney General Mitchell, who sent memoranda to that effect to former Assistant Attorney General Wilson. Letters notifying the government attorneys who had requested the authorizations were sent from the office of the Assistant Attorney General. Assistant Attorney General Wilson's signature was affixed to the letter by former Deputy Assistant Attorney General Petersen, pursuant to procedures prescribed by Mr. Wilson.

The Florida wire interception terminated on February 26, 1970. On May 19, 1970, the district judge ordered that an inventory be served by the marshal upon petitioners Campagnuolo and DiPietro pursuant to 18 U.S.C. 2518(8)(d). The inventory was served on petitioner Campagnuolo on July 1, 1970, and on petitioner DiPietro on July 15, 1970 (Pet. App. 14a). No inventory notice was served on the other petitioners, none of whom had been named in the order authorizing the wire interception.

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[4]The petition for a writ of certiorari in No. 73-903 was filed on December 8, 1973, and is substantially out of time under Rule 22(2) of the Rules of this Court.

1. Petitioners contend that Title III is unconstitutional because it allegedly authorizes general warrants which do not describe with particularity the evidence to be seized, allows an excessive invasion of a citizen's zone of privacy, and authorizes secret searches by not requiring prompt notice, all in violation of the Fourth Amendment, and permits the seizure of testimonial evidence in violation of the Fifth Amendment. Similar attacks have been uniformly rejected by every court of appeals which has passed on the constitutionality of the statute. See *United States* v. *Tortorello,* 480 F. 2d 764 (C.A. 2), certiorari denied, 414 U.S. 866; *United States* v. *Bobo,* 477 F. 2d 974 (C.A. 4), petition for certiorari pending, No. 73-231; *United States* v. *Whitaker,* 474 F. 2d 1246 (C.A. 3), certiorari denied, 412 U.S. 953; *United States* v. *Cox,* 462 F. 2d 1293 (C.A. 8), petition for certiorari pending, No. 72-5278; *United States* v. *Cox,* 449 F. 2d 679 (C.A. 10), certiorari denied, 406 U.S. 934[5]. The court of appeals here correctly characterized petitioners' constitutional objections as "without merit" (Pet. App. 1a).

2. Petitioners also contend that the applications did not show that normal investigative procedures reasonably appeared unlikely to succeed. This contention was also correctly rejected below. In the Florida affidavit, the FBI agent-affiant explained that the interception was necessary because bettors would not cooperate with law enforcement officers investigating gambling activities; because informants who had provided information in the case had stated that they would refuse to testify and that compelling them to testify would expose them to retaliation; because telephone records are not sufficient to

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[5]*Hoffa* v. *United States,* 385 U.S. 293, rejects the contention that the use of an individual's overheard conversations against him violates the Fifth Amendment.

prove the gambling operations; and because standard investigative procedures such as physical surveillance and examination of gambling records promised little probability of success (Affidavit of John J. Cloherty, Jr., February 18, 1970, pp. 10-11, paragraph 6). The agent-affiant made similar averments in the Connecticut affidavit (Affidavit of Richard D. Ludwig, April 7, 1970, pp. 10-11, paragraph 24). The findings of the two district judges, pursuant to Section 2518(3)(c), that the interceptions were necessary because normal investigative procedures reasonably appeared unlikely to succeed, are thus adequately supported by the record.[6]

Petitioners' further contentions that intrastate calls should not have been intercepted and that the evidence derived from the Florida wiretap should be suppressed because those named in the order did not receive the inventory until more than 90 days after the interception terminated (and petitioner Consiglio received no inventory of that interception) are similarly unmeritorious. The former contention is refuted by the fact that an interstate gambling operation would certainly involve intrastate telephone transactions; the latter was discussed and rejected by the district court in its second opinion (Pet. App. 14a-17a), upon which we rely.

3. Petitioners further claim that the authorization procedure within the Department of Justice was improper under the statute and that the proof of the authorization was inadequate. They contend (1) that the government failed to comply with the authorization requirements of Section 2516(1), in that the Attorney General did not properly review and authorized the wire interception ap-

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[6]The district court explicitly so found with respect to the Connecticut order (Pet. App. 20a-21a).

plication; (2) that the affidavits which disclosed the personal authorization by the Attorney General were inadmissible because they constituted hearsay, purported to establish the authority of the affiants to act as agents solely through their own assertions, stated conclusions of law, and purported to set forth facts known to the affiants without establishing a proper foundation; and (3) that the record does not show that the issuing judge in the Southern District of Florida was shown the memo from Mr. Mitchell to Mr. Wilson when the interception order was requested. The latter two contentions were fully discussed and correctly rejected by the district court in its first opinion (Pet. App. 7a-11a), upon which we rely.

Since the issue of the validity of the application authorization procedures followed by the Department of Justice in the instant case is currently pending before this Court in *United States* v. *Chavez*, No. 72-1319, certiorari granted, 412 U.S. 905, argued January 8, 1974, it would be appropriate for the Court to defer disposition of these petitions pending its decision in *Chavez*.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.